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Insurance Company (erroneously sued as "Old Republic
National Title Insurance Company")

10 **UNITED STATES DISTRICT COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA — SAN JOSE DIVISION**

12
13 KIMBERLY COX,
14
15 Plaintiff,

16 vs.

17 OLD REPUBLIC NATIONAL TITLE
18 INSURANCE COMPANY; NEW PENN
FINANCIAL, LLC d/b/a SHELLPOINT)
19 MORTGAGE SERVICING; THE BANK
OF NEW YORK MELLON CORPORATION
AS TRUSTEE FOR THE) CERTIFICATE-
20 HOLDERS OF CWMBS INC CHL)
MORTGAGE PASS-THROUGH TRUST
21 2005-02;) and, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

22 Defendants.
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Case No. 15-CV-02253-BLF
Hon.: Beth Labson Freeman
Ct. Room: 3 – 5th Fl.

**DEFENDANT OLD REPUBLIC
DEFAULT MANAGEMENT SERVICES'
NOTICE OF MOTION AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 12(b)(6);
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Hearing: November 5, 2015
Time: 9:00 a.m.
Courtroom: 3 - 5th Floor

Action Filed: May 24, 2015
Trial Date: None Set

NOTICE OF MOTION AND MOTION TO DISMISS

Please take notice that the hearing on the Motion to Dismiss pursuant to Federal Rule of Civil Procedure Rule 12b(6), by defendant OLD REPUBLIC DEFAULT MANAGEMENT SERVICES, a Division of Old Republic National Title Company to dismiss the First Amended Complaint filed by plaintiff KIMBERLY COX (“Plaintiff”), is set for hearing on Thursday, November 5, 2015, at 9:00 a.m., or as soon thereafter as may be heard, before the Honorable Beth Labson Freeman, in Courtroom 3-5th Floor, located at 280 South First Street, San Jose, California, 95113.

This motion is based on this notice of motion and motion, the memorandum of points and authorities in support thereof, the request to take judicial notice, and all court documents already on file, any opposition filed by Plaintiff and any reply filed by Old Republic in response, and any oral argument or other matters for which the Court make take note.

DATED: August 20, 2015

SEVERSON & WERSON
A Professional Corporation

By: /s/ David M. Liu
DAVID M. LIU

Attorneys for Defendant
OLD REPUBLIC DEFAULT MANAGEMENT
SERVICES, a Division of Old Republic National Title
Insurance Company (erroneously sued as “Old Republic
National Title Insurance Company”)

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kimberly Cox's first amended complaint ("FAC") alleges that defendants are attempting to enforce loan obligations on a non-existent loan and that, in any event, plaintiff rescinded the non-existent loan. Plaintiff asserts throughout her FAC that certain of the defendants "never existed" and, thus, could not make the loan, enforce its terms or foreclose. Tellingly, instead of filing an action for fraud or for declaratory relief to expunge the allegedly fraudulent deed of trust and the subsequent foreclosure documents, plaintiff filed an action for alleged lending, servicing and foreclosure violations. None of these claims should survive Old Republic's motion to dismiss.

First and foremost, a trustee under a deed of trust, such as defendant Old Republic, plays a limited role in the foreclosure process. "The trustee under a deed of trust 'is not a true trustee, and owes no fiduciary obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed of trust. [The trustee's] only duties are: (1) upon default to undertake the steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the deed of trust.' [Citation omitted.] Consistent with this view, California courts have refused to impose duties on the trustee other than those imposed by statute or specified in the deed of trust." *Heritage Oaks Partners v. First Am. Title Ins. Co.*, 155 Cal. App. 4th 339, 345 (2007); *Vogan v. Wells Fargo Bank, N.A.*, 2:11-CV-02098-JAM, 2011 WL 5826016, at *4 (E.D. Cal. Nov. 17, 2011).

Plaintiff sues Old Republic for rescission of the loan pursuant to the Truth in Lending Act ("TILA"). However, plaintiff cannot seek a TILA claim against Old Republic as it is not (and never was) a creditor to plaintiff. Moreover, all of the claims against Old Republic fail as a matter of law.

As plaintiff has failed to state any claim against Old Republic, the motion to dismiss the FAC should be granted without leave to amend.

1 **II. STATEMENT OF FACTS**

2 On or about December 10, 2004, Plaintiff Kimberly Cox entered into the subject loan to
 3 refinance her property. Pursuant to the note evidencing the loan, Plaintiff promised to pay
 4 \$544,000.00 to the lender, American's Wholesale Lender. In order to secure the note, Plaintiff
 5 took out a Deed of Trust against the real property commonly known as 131 Sutphen St., Santa
 6 Cruz, CA 95060-1939 ("Property"). RJN Ex. A. Pursuant to the deed of trust, the beneficiary
 7 under the Deed of Trust was Mortgage Electronic Registration Systems, Inc. ("MERS") as
 8 nominee for lender America's Wholesale Lender and its successors and assigns. Pursuant to the
 9 Deed of Trust, CTC Real Estate Services was the original trustee. *Id.* The Deed of Trust
 10 specifically granted MERS, as nominee for lender and its successor and assigns, the right to
 11 foreclose and sell the Property. *Id.*

12 On November 13, 2009, MERS, as Nominee for America's Wholesale Lender, executed a
 13 Substitution of Trustee and Assignment of Deed of Trust. RJN Ex. B. This document substituted
 14 defendant Recontrust Company as the new trustee on the Deed of Trust. RJN Ex. B. The
 15 document also assigned the Deed of Trust to defendant The Bank of New York Mellon. *Id.* The
 16 Substitution of Trustee and Assignment of Deed of Trust were recorded on December 7, 2009. *Id.*

17 On December 10, 2014, Shellpoint, as the servicer for the Bank of New York Mellon,
 18 substituted Old Republic as the trustee under the deed of trust. RJN Ex. C. On December 19,
 19 2014, Old Republic recorded a Notice of Default. RJN Ex. D. On April 30, 2015, Old Republic
 20 recorded a Notice of Trustee's Sale. RJN Ex. E.

21 **III. STANDARD OF REVIEW**

22 Federal Rule of Civil Procedure 12(b)(6) provides that a pleading may be challenged and
 23 dismissed for failing to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).
 24 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory or
 25 fails to plead facts essential to state a cognizable legal theory. *See Robertson v. Dean Witter*
 26 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). Conclusory allegations of law, unwarranted
 27 deductions of fact, or unreasonable inferences are insufficient to defeat a motion to dismiss. *See*
 28

1 *Fields v. Legacy Health Sys.*, 413 F.3d 943, 950 n.5 (9th Cir. 2005); *Sprewell v. Golden State*
 2 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

3 The complaint must do more than allege mere “labels and conclusions” or “a formulaic
 4 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A
 5 pleading does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
 6 enhancement.’” *Iqbal*, 129 S.Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
 7 (2007)). Rather, it must give the defendant fair notice of the nature of the claim and the grounds
 8 upon which it rests. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). In the absence of
 9 such factual allegations, a district court must dismiss the pleading because “the tenet that a court
 10 must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of
 11 action’s elements, supported by mere conclusory statements.” *Iqbal*, 129 S.Ct. at 1940 (citing
 12 *Twombly*, 550 U.S. at 555).

13 Facts subject to judicial notice may be considered on a motion to dismiss. *See Mullis v.*
 14 *United States Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987). While the Court accepts as
 15 true the well-pleaded facts of a complaint when deciding a motion to dismiss, the Court need not
 16 accept as true a conclusory allegation that directly contradicts a judicially noticeable fact. *See,*
 17 *e.g., Sprewell, supra*, 266 F.3d at 988; *Mullis*, 828 F.2d at 1388.

18 **IV. ARGUMENT**

19 **A. The First Claim For Alleged Violation Of 15 U.S.C. § 1635 And 12 C.F.R. §** 20 **226.23 Do Not Apply To Old Republic**

21 Through her first claim, plaintiffs seeks to rescind the subject loan under the Truth in
 22 Lending Act and its accompanying regulations at 12 C.F.R. § 226.23. Through these statutes and
 23 regulations, a borrower may seek to rescind a loan against a creditor under certain circumstances.
 24 A creditor is defined as “A person who regularly extends consumer credit that is subject to a
 25 finance charge or is payable by written agreement in more than four installments (not including a
 26 down payment), and to whom the obligation is initially payable, either on the face of the note or
 27 contract, or by agreement when there is no note or contract.” 12 C.F.R. § 226.2(a)(17).
 28

1 The problem with this claim against Old Republic is that it is not alleged to be a creditor.
 2 The complaint alleges that Old Republic is the substituted trustee under a deed of trust (although
 3 plaintiff contends that Old Republic was not the proper trustee). *See* FAC, ¶¶ 8. Hence, this claim
 4 simply does not apply to Old Republic and the motion to dismiss should be granted without leave
 5 to amend.

6 Here, Old Republic was the properly substituted trustee under the deed of trust. Civil Code
 7 section 2934a specifically permits the substitution of trustees under a deed of trust. A trustee
 8 named in a recorded substitution of trustee is authorized to act as the trustee from the date the
 9 substitution of trustee is executed. *See* Cal. Civ. Code § 2934a(d). Once the substitution of trustee
 10 is recorded, the substitution of trustee “[s]hall constitute conclusive evidence of the authority of
 11 the substituted trustee or his or her agents to act pursuant to this section.” *See id.* “The
 12 nonjudicial foreclosure scheme enacted by the Legislature authorizes the “trustee, mortgagee, or
 13 beneficiary, *or any of their authorized agents*” to record a notice of default and election to sell
 14 upon the trustor-debtors default on the secured debt.” *Jenkins v. JP Morgan Chase Bank, N.A.*,
 15 216 Cal. App. 4th 497, 516 (2013), as modified (June 12, 2013) (emphasis in original).

16 On December 10, 2014, Shellpoint substituted the trustee on the Deed of Trust for the
 17 Property to Old Republic. Ex. C to RJN. Thereafter, Old Republic executed the notice of default
 18 and the subsequent notice of trustee sale. *See* Exs. D and E. to RJN. Hence, the substitution of
 19 trustee was proper and fully complied with Civil Code section 2934a.

20 As Old Republic was properly substituted as the trustee, the allegations to the contrary lack
 21 any factual support.

22 **B. Plaintiffs’ Second Claim For Fraud Fails Because It Is Not Sufficiently-**
 23 **Pleaded Against Old Republic**

24 The elements for fraud are: (a) misrepresentation (false representation, concealment, or
 25 nondisclosure); (b) knowledge of the statement’s falsity (scienter); (c) intent to defraud (i.e., to
 26 induce action in reliance on the misrepresentation); (d) justifiable reliance; and (e) resulting
 27 damage. *See, e.g., Flaxel v. Johnson*, 541 F.Supp.2d 1127, 1145 (S.D. Cal. 2008); *Johnson v. First*
 28

1 *Fed. Bank of California*, 2008 WL 2705090, at *5 (N.D. Cal. 2008); *Lazar v. Superior Court*, 12
2 Cal.4th 631, 638 (1996).

3 Under Federal Rule of Civil Procedure 9(b) (“Rule 9(b)”), “[i]n alleging fraud..., a party
4 must state with particularity the circumstances constituting fraud....” Rule 9(b) governs plaintiffs’
5 complaint even if it was filed in state court before the case was removed to federal court. *See, e.g.,*
6 *Lopez v. GMAC Mortgage Corp.*, 2007 WL 3232448, at *4 (N.D. Cal. 2007); *see also* Fed. R. Civ.
7 P. 81(c) (“These rules apply to a civil action after it is removed from a state court.”).

8 To satisfy Rule 9(b)’s standard, the complaint must allege “particular facts going to the
9 circumstances of the fraud, including time, place, persons, statements made and an explanation of
10 how or why such statements are false or misleading.” *Morris v. BMW of N. Am., LLC*, 2007 WL
11 3342612, at *3 (N.D. Cal. 2007) (citing *In re Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 n.7
12 (9th Cir. 1994) (en banc)); *see also Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
13 1393, 1401 (9th Cir. 1986) (noting that under Rule 9(b) “the pleader must state the time, place, and
14 specific content of the false representations as well as the identities of the parties to the
15 misrepresentation.”).

16 In a fraud action against a corporation, the complaint must “allege the names of the persons
17 who made the allegedly fraudulent representations, their authority to speak, to whom they spoke,
18 what they said or wrote, and when it was said or written.” *Saldade v. Wilshire Credit Corp.*, 686
19 F.Supp.2d 1051, 1064 (E.D. Cal. 2010), quoting *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2
20 Cal.App.4th 153, 157 (1991).

21 When suing multiple defendants for fraud, a plaintiff “must provide each and every
22 defendant with enough information to enable them ‘to know what misrepresentations are
23 attributable to them and what fraudulent conduct they are charged with.’ ” *Pegasus Holdings v.*
24 *Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998), quoting *In re*
25 *Worlds of Wonder Sec. Litig.*, 694 F.Supp. 1427, 1433 (N.D. Cal. 1988). “Rule 9(b) does not allow
26 a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to differentiate
27 their allegations when suing more than one defendant ... and inform each defendant separately of
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1 the allegations surrounding his alleged participation in the fraud.’ ” *Swartz v. KPMG LLP*, 476
 2 F.3d 756, 764-765 (9th Cir. 2007).

3 The fraud claims fail against Old Republic. The fraud claims fails to offer any specific
 4 facts that any authorized representative for Old Republic made any fraudulent statements to
 5 plaintiff at any time. The FAC is completely devoid of what was said, by whom, when it was said
 6 and how it was communicated. Moreover, the FAC fails to identify how plaintiff was harmed by
 7 an alleged fraudulent conduct by Old Republic. Accordingly, the motion to dismiss should be
 8 granted.

9 **C. The Third Claim For Alleged Violation Of The California And Federal Fair**
 10 **Debt Collection Practices Acts Fails Against Old Republic**

11 Plaintiff alleges violations of 15 U.S.C. § 1692 (“Section 1692”) of the Federal Fair Debt
 12 Collection Practices Act (“FDCPA”) and of the California Rosenthal Fair Debt Collection
 13 Practices Act.

14 Plaintiff makes conclusory allegations that Old Republic allegedly violated the federal
 15 FDCPA by using unfair and unconscionable means to collect a debt.

16 The Rosenthal Fair Debt Collection Practices Act (“FDCPA”) was enacted to prohibit debt
 17 collectors from engaging in unfair or deceptive practices or acts in the collection of consumer
 18 debts. (Cal. Civ. Code § 1788.1(c).) The term “debt” is defined as “money, property or their
 19 equivalent which is due or owing or alleged to be due or owing from a natural person to another
 20 person.” The term “debt collector” means “any person who, in the ordinary course of business,
 21 regularly, on behalf of himself or herself or others, engages in debt collection.” The FDCPA
 22 prohibits, among other things, the use of threats, physical force, an accusation that a debtor would
 23 be criminally liable for a debt, false accusations or use of obscenities or profanity. (Cal. Civ. Code
 24 §§ 1788.10 to 1788.13.)

25 Both the federal and state FDCPA violations fail against Old Republic because, simply
 26 stated, Old Republic is not a debt collector. Plaintiff attempts to allege that Old Republic is a debt
 27 collector, but aside from mere allegations, plaintiff has no facts that Old Republic did anything
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1 other than act as a foreclosure trustee. Hence, the FDCPA claim fails and the motion to dismiss
2 should be granted without leave to amend.

3 **D. The Fourth Claim For Alleged Violation Of The Truth In Lending Act Fails**
4 **Because It Is Not Sufficiently-Pleaded**

5 Plaintiff alleges a violation of the Truth in Lending Act (“TILA”) at 15 U.S.C. § 1641(g)
6 which provides that:

7 (1) In general

8 In addition to other disclosures required by this subchapter, not later than
9 30 days after the date on which a mortgage loan is sold or otherwise
10 transferred or assigned to a third party, the creditor that is the new owner or
assignee of the debt shall notify the borrower in writing of such transfer,
including—

- 11 (A) the identity, address, telephone number of the new creditor;
- 12 (B) the date of transfer;
- 13 (C) how to reach an agent or party having authority to act on
behalf of the new creditor;
- 14 (D) the location of the place where transfer of ownership of the
debt is recorded; and
- 15 (E) any other relevant information regarding the new creditor.

16 (2) Definition

17 As used in this subsection, the term “mortgage loan” means any consumer
credit transaction that is secured by the principal dwelling of a consumer.

18 As noted in this motion to dismiss, Old Republic is simply not alleged to be a creditor to
19 plaintiff. Thus, this claim fails as a matter of law.

20 **E. The Fifth Claim For Alleged Unfair Competition Fails Because Plaintiff Failed**
21 **To Allege Standing To Sue And The Claim Is Insufficiently-Pleaded**

22 Under California Business and Professions Code section 17200 (“Section 17200”), unfair
23 competition is defined as “any unlawful, unfair or fraudulent business act or practice” and “unfair,
24 deceptive, untrue or misleading advertising.” *See* Cal. Bus. & Prof. Code § 17200. An act is
25 “unlawful” under Section 17200 if it violates an underlying state or federal statute or common law.
26 *See Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).
27 An act is “unfair” if the act “threatens an incipient violation of an antitrust law, or violates the
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1 policy or spirit of one of those laws because its effects are comparable to or the same as a violation
 2 of the law.” *Id.* at 187. A practice is “fraudulent” if members of the public are likely to be
 3 deceived. *See Committee on Children's Television, Inc. v. Gen'l Foods Corp.*, 35 Cal. 3d 197, 211
 4 (1983).

5 A plaintiff alleging unfair business practices under Section 17200 must state with
 6 reasonable particularity the facts supporting the statutory elements of the violation. *See Silicon*
 7 *Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) (*quoting*
 8 *Khoury v. Maly's of California*, 14 Cal. App. 4th 612, 619 (1993)).

9 An “unfair practices claim under section 17200 cannot be predicated on vicarious liability
 10 because a defendant’s liability must be based on his personal ‘participation in the unlawful
 11 practices’ and ‘unbridled control’ over the *practices that are found to violate section 17200 or*
 12 *17500.*” *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal.App.4th 952, 960 (2002); *Morfin v. Accredited*
 13 *Home Lenders, Inc.*, 2010 WL 391838, at *7 (S.D. Cal. Jan. 26, 2010). Thus, plaintiff cannot
 14 simply lump all defendants together without identifying which defendant is responsible for her
 15 alleged injuries. *See Fortaleza v. PNC Fin. Services Group, Inc.*, 642 F. Supp. 2d 1012, 1019-20
 16 (N.D. Cal. 2009).

17 Further, to sufficiently allege a Section 17200 claim, plaintiff “must have suffered an
 18 ‘injury in fact’ and ‘lost money or property as a result of such unfair competition.’” *Hall v. Time*
 19 *Inc.*, 158 Cal. App. 4th 847, 849 (2008); *Ruiz v. Gap, Inc.*, 540 F.Supp.2d 1121, 1127 (N.D. Cal.
 20 2008).

21 Where the underlying claims are deficient, a Section 17200 claim must also fail. *See Singh*
 22 *v. Wells Fargo Bank, N.A.*, 2009 WL 2365881, *5 (N.D. Cal. 2009) (dismissing a mortgage
 23 borrower’s claim under Section 17200 where that claim was derivative of a deficient fraud claim
 24 that was also dismissed); *Hutson v. Am. Home Mortg. Servicing, Inc.*, 2009 WL 3353312, *15-16
 25 (N.D.Cal.2009) (dismissing a UCL claim predicated on other failed claims); *Beall v. Quality Loan*
 26 *Serv. Corp.*, 2011 WL 1044148, at *5 (S.D. Cal. Mar. 21, 2011) (same).

1 Further, a “practice” requires, at a minimum, ongoing conduct.” *Mangini v. Aerojet-Gen.*
 2 *Corp.*, 230 Cal. App. 3d 1125, 1156 (1991). “Relief under section 17200 is unavailable to remedy
 3 past misconduct.” *Id.*

4 Here, plaintiff’s Section 17200 fails as a matter of law against Old Republic. Plaintiff
 5 lumps “defendants” together as violation the statute, but she fails to specifically identify the
 6 conduct of each defendant and exactly what was committed. As a matter of law, Old Republic
 7 cannot be liable for the alleged conduct of the other defendants. Further, the Property has not been
 8 sold at foreclosure, so plaintiff cannot allege standing through the loss of money or property.

9 Accordingly, this claim fails as a matter of law against Old Republic.

10 **F. The Sixth Cause Of Action For Slander of Title Is Not Sufficiently-Pleaded**
 11 **Against Old Republic**

12 Slander of title is defined as “One who, without a privilege to do so, publishes matter
 13 which is untrue and disparaging to another's property in land ... under such circumstances as
 14 would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee
 15 thereof might be determined thereby is liable for pecuniary loss resulting to the other from the
 16 impairment of vendibility thus caused.” *Seeley v. Seymour*, 190 Cal. App. 3d 844, 857 (1987).
 17 “[P]rotection from injury to the salability of property is the thrust of the tort.” *Id.* at 858.

18 “The elements of a cause of action for slander of title are “(1) a publication, (2) which is
 19 without privilege or justification, (3) which is false, and (4) which causes direct and immediate
 20 pecuniary loss.” *Alpha & Omega Dev., LP v. Whillock Contracting, Inc.*, 200 Cal. App. 4th 656,
 21 664 (2011), review denied (Feb. 15, 2012). Importantly, a slander of title claim must be brought
 22 by the owner of the property. *See Slusher v. Buckley*, 174 Cal. App. 2d 324 (1959).

23 Civil Code section 47 provides that a “privileged publication or broadcast is one made: (a)
 24 In the proper discharge of an official duty ... or (b)(4) in the initiation or course of any other
 25 proceeding authorized by law. . . .” The statutorily required mailing, publication, and delivery of
 26 non-judicial Civil Code section 2924 foreclosure notices fall under the Civil Code section 47(c)(1)
 27 privilege. *See Civ. Code §2924(d)(1); Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 333 (2008).
 28 Civil Code section 47’s privilege “bars all tort causes of action except malicious prosecution.”

1 *Jacob B. v. County of Shasta*, 40 Cal. 4th 948, 960 (2007). In particular, the privilege bars a
 2 slander of title claim based on the recordation of the privileged document. *See Albertson v.*
 3 *Raboff*, 46 Cal. 2d 375, 378-81 (1956).

4 The slander of title claim fails against Old Republic. Old Republic's conduct in recording
 5 the Notice of Default and Notice of Trustee's Sale is privileged conduct. Thus, there is absolutely
 6 no basis for a slander of title claim against Old Republic and motion to dismiss should be granted
 7 without leave to amend.

8 **G. The Seventh Claim For Unjust Enrichment Fails As A Matter Of Law**

9 Unjust enrichment is not a separate cause of action. "[T]here is no cause of action in
 10 California for unjust enrichment. 'The phrase 'unjust enrichment' does not describe a theory of
 11 recovery, but an effect: the result of a failure to make restitution under circumstances where it is
 12 equitable to do so.' Unjust enrichment is 'a general principle, underlying various legal doctrines
 13 and remedies,' rather than a remedy itself. It is synonymous with restitution.'" *McBride v.*
 14 *Boughton*, 123 Cal. App. 4th 379, 387 (2004); *Melchior v. New Line Prods., Inc.*, 106 Cal. App.
 15 4th 779, 793 (2003). "[T]he 'mere fact that a person benefits another is not of itself sufficient to
 16 require the other to make restitution therefor.'" *Marina Tenants Assn. v. Deauville Marina*
 17 *Development Co.*, 181 Cal. App. 3d 122, 134 (1986).

18 Further, "[a]s a matter of law, a quasi-contract action for unjust enrichment does not lie
 19 where, as here, express binding agreements exist and define the parties' rights." *California*
 20 *Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California, Inc.*, 94 Cal. App. 4th 151, 172 (2001).
 21 "When parties have an actual contract covering a subject, a court cannot—not even under the
 22 guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that
 23 subject in place of the parties' own contract." *Hedging Concepts, Inc. v. First Alliance Mortgage*
 24 *Co.*, 41 Cal.App.4th 1410, 1419–1420 (1996).

25 Here, an unjust enrichment claim fails as a matter of law. First, it is not an independent
 26 cause of action. And in any event, any mortgage payments were made under a loan agreement
 27 between the plaintiff and the lender. There are no facts to support that plaintiff made any
 28

1 payments to Old Republic. There is no basis for unjust enrichment and the motion to dismiss
2 should be granted without leave to amend.

3 **H. The Eighth Cause Of Action For Cancellation Of Instruments Fails Because**
4 **Plaintiff Must Tender The Loan Proceeds To Rescind The Loan**

5 Civil Code section 3412 provides that: “A written instrument, in respect to which there is
6 reasonable apprehension that if left outstanding it may cause serious injury to a person against
7 whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be
8 delivered up or canceled.”

9 Notes and deeds of trust may be cancelled, for example, where fraud makes the
10 instruments void or voidable. *See Fleming v. Kagan*, 189 Cal. App. 2d 791, 796-97 (1961). Here,
11 there is no alleged fraud in obtaining the loan and, hence, no basis for canceling the loan. Further,
12 “[i]n obtaining rescission or cancellation, the rule is that the complainant is required to do equity,
13 as a condition to his obtaining relief, by restoring to the defendant everything of value which the
14 plaintiff has received in the transaction.” *Id.* at 796. California Civil Code section 1688 provides
15 that “a contract is extinguished by its rescission.” In order to rescind a contract, the rescinding
16 party must restore all consideration to the other party that was received under the contract. See
17 Civ. Code § 1691(b); *Runyan v. Pacific Air Industries*, 2 Cal. 3d 304, 311-313 (1970).

18 Plaintiff seeks to cancel the underlying loan and foreclosure documents. Plaintiff bases the
19 cancellation claim on the alleged fraudulent loan and foreclosure documents. If the cancellation is
20 based on fraud, then plaintiff must satisfy the heightened pleading requirements. Plaintiff has
21 failed to do so and has failed to allege how the loan was fraudulent or how the foreclosure was
22 fraudulent.

23 **I. The Ninth Claim For Quiet Title Fails Against Old Republic Because It Has**
24 **No Interest In The Property**

25 An action for quiet title is brought to establish a person’s right to title as to adverse claims.
26 (Cal. Civ. Proc. Code § 760.020(a).) A “claim” is defined as “[a] legal or equitable right, title,
27 estate, lien, or interest in property or cloud upon title.” (Cal. Civ. Proc. Code § 760.010(a).) A
28 complaint for quiet title must be verified, include a legal description and property address and the

1 bases for plaintiff's claim to title. (Cal. Civ. Proc. Code § 761.020(a)-(b).) Further, the complaint
 2 must also state the adverse claims to the title and a date on which a determination of title is sought.
 3 (Cal. Civ. Proc. Code § 761.020(c)-(d).)

4 "It is settled in California that a mortgagor cannot quiet his title against the mortgagee
 5 without paying the debt secured." *Shimpones v. Stickney*, 219 Cal. 637, 649 (1934); *see Mix v.*
 6 *Sodd*, 126 Cal.App.3d 386, 390 (1981) ("a mortgagor in possession may not maintain an action to
 7 quiet title, even though the debt is unenforceable"); *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477
 8 (1974) (a trustor is unable to quiet title "without discharging his debt").

9 Here, plaintiff cannot seek quiet title against Old Republic because it has no interest in the
 10 Property. Old Republic was only the foreclosure trustee which recorded foreclosure documents,
 11 and never had a beneficial interest in the Property.

12 Plaintiff also must have paid off her loan obligation to seek quiet title. Having failed to do
 13 so, she cannot seek to quiet title on the Property until she has done so.

14 **V. CONCLUSION**

15 Accordingly, Old Republic's motion to dismiss the FAC should be granted without leave
 16 to amend.

18 DATED: August 20, 2015

SEVERSON & WERSON
 A Professional Corporation

21 By: /s/ David M. Liu
 David M. Liu

23 Attorneys for Defendant
 OLD REPUBLIC DEFAULT MANAGEMENT
 SERVICES, a Division of Old Republic National Title
 Insurance Company (erroneously sued as "Old Republic
 25 National Title Insurance Company")

PROOF OF SERVICE**Cox v. Old Republic Default Management Services, et al.****USDC Case No.: 15-CV-02253 BLF**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is The Atrium, 19100 Von Karman Avenue, Suite 700, Irvine, CA 92612.

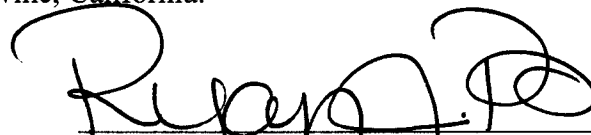
On August 20, 2015, I served true copies of the following document(s): **DEFENDANT OLD REPUBLIC DEFAULT MANAGEMENT SERVICES' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6); AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

- ☐ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☒ **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.
- ☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on August 20, 2015, at Irvine, California.



RYAN J. BROOKS

SERVICE LIST

Cox v. Old Republic Default Management Services, et al.

USDC Case No.: 15-CV-02253 BLF

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